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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 953

AARON FRANZBLAU and RUTH SCHLEIN,

Petitioners,

vs.

MAMIE SOLES, Administratrix *ad prosequendum* for the estate of DONNIE SOLES, deceased, and WILLIE ASKINS, Administrator *ad prosequendum* for the estates of DOROTHY ASKINS SOLES, deceased, and ALFREDA ASKINS, deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix A, page 18a, petition for *certiorari*. The opinion of the Court of Appeals for the Third Circuit is printed in Appendix C, page 3a and is reported in 352 F. 2d 47.

Jurisdiction

As alleged in the petition for *certiorari*, the jurisdiction of this Court is invoked under 28 U. S. C. A. section 1254 (1).

Questions Presented

The petition for *certiorari* states that the decision below presents six questions for review. These questions are incorrectly and improperly presented because they overlook the main fact that the opinion of the Court of Appeals for the Third Circuit, rendered November 2, 1965, specifically concluded that the findings of fact made by the District Court Judge were clearly erroneous. The question as it should be stated is:

> 1. Is not the Court of Appeals empowered to set aside the ultimate findings of fact of the trial court where those findings have been found to be clearly erroneous?

Statutes and Rules Involved

The statement of statutes and rules involved contained in the petition for *certiorari* is complete.

Statement of the Case

This civil action arises from a fire that swept through a Newark tenement in the early morning hours of June 8, 1961. As a result of this fire, three of the four members of a family occupying a rear third floor apartment perished. This action was brought by the administrator *ad prosequendum* of the estate of Donnie Soles and the administrator *ad prosequendum* of the estate of Dorothy Askins Soles and Alfreda Askins.

The building in question was a three-story frame tenement constructed in the 1890's and had one store and an apartment on the first floor and two apartments on the second and third floors, respectively. The sole means of ingress and egress consisted of a front stairway that extended to the third floor and a rear stairway that ran through the enclosed clapboard back porches on each floor up to the third floor. At each floor level there was a common hallway connecting the front and rear stairways. In each apartment there was but one exit that opened onto the common hallway. Therefore, a tenant could only leave his apartment by the one door and by so doing would enter onto the common hallway. There was no fire escape or other avenue of escape other than dropping to the ground from the apartment windows (26a, 35a, 37a to 38a).

A policeman on duty in this precinct on the morning of June 8, 1961, testified that he had passed the building in question approximately five minutes before he received an alarm call that there was a fire. He immediately returned to the scene and found the building ablaze, with people jumping out of the windows. The fire was so intense that it was not possible for him to go in either entrance. When the firemen arrived shortly thereafter, he helped place a ladder against the building halfway between the second and third floors. He stated that he ascended the ladder and was able to break the fall of eight-year-old Alfred Askins, the sole survivor from the Soles apartment, who had been thrown out of a third floor window (28a to 30a). Twenty-five-year-old Donnie Soles was burned to death in his apartment, while twenty-seven-year-old Dorothy Soles and Alfreda Askins, age 7, were subsequently taken out of the burned apartment and died the same day in the hospital.

Plaintiffs' cause of action was predicated *inter alia*, on a violation of the Tenement House Act of New Jersey, in that defendants had failed to provide a fire escape or, in the alternative, two independent stairways not adjacent to each other, as required by N. J. Rev. Stat. 55:3-4. It was plaintiffs' contention that the above statute imposed a standard of conduct, the violation of which constituted actionable negligence.

The case was tried before Judge Coolahan without a jury on February 11 and 13, 1964. At the close of the testimony the court reserved decision and, subsequently, on June 23, 1954, rendered a decision for the defendants and against the plaintiffs. The court found that defendants had violated the above statute and were negligent, but held that there was no evidence to establish a causal relationship between defendants' breach and the deaths. Judgment was entered accordingly. Plaintiffs appealed from the adverse judgment.

Thereafter, on appeal, the Court of Appeals for the Third Circuit reversed for the reasons stated in the opinion. The Court of Appeals found that the finding of the ultimate fact was *clearly erroneous*. (See Appendix C 8a, petitioner's petition for writ of *certiorari*.) There the court stated:

> "Moreover, application of the rule could not avail the defendants. Measured by the standard established by *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), the ultimate findings of fact were clearly erroneous."

Reasons for Not Granting the Writ

1. The opinion and judgment of the Court of Appeals for the Third Circuit are in complete conformity with Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

In reversing the judgment of the District Court for the District of New Jersey, the Court of Appeals held that the ultimate findings of fact were clearly erroneous and therefore Rule 52(a) of the Rules of Civil Procedure did not apply (see Appendix C 8a):

> "Moreover, application of the rule could not avail the defendants. Measured by the standard established by *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), the ultimate findings of fact were clearly erroneous."

This is a correct interpretation of the scope of 52(a), as set forth by the United States Supreme Court in the case of *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 393 (1948), 68 S. Ct. 525, 541.

2. There is no conflict between any circuit requiring final clarification by the Supreme Court on the right of the Circuit Court of Appeals to set aside a finding of fact under Rule 52(a) when it rules that the findings of fact were clearly erroneous.

Every Circuit Court and the United States Supreme Court, as stated in the conclusion of this Court in *United States* v. *United States Gypsum Co., supra,* has held that where the findings of fact are clearly erroneous the court has a right to set aside the finding of fact.

3. Not only is the opinion and ruling of the Court of Appeals for the Third Circuit in complete conformity with Rule 52(a) but also with the rulings of the United States Supreme Court.

The United States Supreme Court in the case of *United States* v. *United States Gypsum Co., supra,* held in referring to the application of Rule 52(a) on appeal (333 U. S. at p. 394 and 68 S. Ct. at pp. 541-542):

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

It is erroneously stated by the petitioners in their petition at p. 9: "Not only did the Court of Appeals set aside the trial court's findings . . ., but it exceeded its appellate function by entering judgment in favor of plaintiffs." This is a complete misstatement of fact, as appears from Appendix C 8a, wherein the court stated that the matter should be remanded:

> "The judgment of the court below will be reversed and the action will be remanded with directions that (1) judgment be entered in favor of the plaintiffs, and (2) the Court proceed to a determination of

the issues raised by the respective claims for damages."

Nowhere does the petition for review, as filed, present a federal question of substance not heretofore determined by this Court.

Nowhere does the petition present a question that has not been decided in accordance with the applicable decisions of this Court. (See *United States* v. *United States Gypsum Co., supra.*)

Nowhere does the petition present a question wherein the Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of any other court of appeals. In fact, all the courts of appeal are in complete agreement that the appellate court need not follow the findings of fact when it determines that they are clearly erroneous, as in the instant case.

The Circuit Court of Appeals for the Third Circuit reached its conclusion based upon the sole fact that the findings made by the court below were clearly erroneous, and it was left with the firm conviction that a mistake had been committed.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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